

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Reserved on : 12th January, 2023**
Pronounced on: 18th April, 2023

+ **O.M.P. (COMM) 288/2019 & I.A. 10267/2019**

BHARAT SANCHAR NIGAM LIMITED Petitioner

Through: Mr. Dinesh Agnani, Sr. Advocate
with Ms. Sangeeta Sondhi, Mr.
Gorang Goyal and Ms. Ishita
Kadyan, Advocates

versus

M/S MAVERICK MOBILE SOLUTION Respondent

Through: Mr. Jayant Mehta, Sr. Advocate
with Ms. Malvika Kapila, Mr.
Pranav Sarthi, Ms. Tanwangi
Shukla and Ms. Rudrakshi,
Advocates

CORAM:

HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

J U D G M E N T

CHANDRA DHARI SINGH, J.

1. The instant petition under section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter "The Act, 1996") has been filed on behalf of the petitioner seeking the following reliefs:

- “(a) set aside the impugned award dated 27.05.2019 passed by the Ld. Arbitrator in the arbitration proceedings titled M/s Maverick Mobile Solutions Pvt. Ltd. V s. Bharat Sanchar Nigam Ltd.;*
(b) Summon the complete arbitral record from the Ld. Arbitrator before this Hon'ble court;

(c) pass such other or further order(s) as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.”

FACTUAL MATRIX

2. The facts necessary for the disposal of the present petition are that the Petitioner, Bharat Sanchar Nigam Limited (BSNL) is a company incorporated under the provisions of the Companies Act, 1956 having its registered office at Bharat Sanchar Bhawan, Harish Chander Mathur Lane, Janpath, New Delhi 110001. The petitioner is a state-owned telecom company engaged in providing telecom services all over the country, except the cities of Mumbai and Delhi.

3. The respondent, M/S Maverick Mobile Solutions is a company incorporated under the Companies Act, 1956 having its registered office at D-34B, ground floor, Moti Nagar, New Delhi 110015. The respondent is involved in the business of envisaging and developing mobile applications to enhance the user experience of mobile devices, mobile application conceptualization, development and advanced data services.

4. The Department of Post (hereinafter “DoP”), in June 2008 approached the petitioner to avail the services of SMS in order to launch Electronic Money Order Service for their customers.

5. In the midst of consideration of the proposal, in October 2008, the respondent/claimant approached the petitioner with a Mobile Banking & E-Commerce Proposal for which a field trial was subsequently conducted at Petitioner’s network in Chandigarh. Thereafter, the respondent/claimant approached the DoP and the petitioner on 2nd December 2008 wherein it was decided that the respondent would be

positioned as the tech partner and a small pilot would be started on 1st March 2009. It was further decided that the petitioner will enter into an agreement with both the DoP and the respondent separately.

6. An Agreement dated 27th March 2012 was made between the petitioner and the DoP for 36 months (hereinafter “DoP Agreement”) followed by an Agreement between the petitioner and the respondent/claimant dated 30th March 2012 (Main Agreement). The terms and conditions of the Main Agreement were more or less in consonance with the DoP Agreement signed between the DoP and the petitioner.

7. The Agreement between the petitioner and the respondent was on a revenue-sharing basis in the ratio of 60:40. The Mobile Money Transfer Service (MMTS) technology was the backbone for the successful implementation thereof.

8. The petitioner had to act as a facilitator between the respondent and the DoP for smooth execution. As per the terms of the Agreement, hardware, equipment, software, installation, testing, and commissioning, training and handsets, would be provided and carried out by the respondent and the petitioner had the responsibility of providing network, SIM cards and implementing necessary guidelines for the smooth functioning of the project.

9. Both Agreements were renewed once again for a period of 36 months till 29th March 2018 after which the DoP decided not to renew the same after the expiry of the second term. Consequently, the petitioner informed the respondent about the same and the Main Agreement also came to an end in terms of Clause 3, Part I, of the Commercial Conditions of the Main Agreement, to which the respondent protested. However, the

DoP gave reasons *vide* various communications regarding the same.

10. On 29th July 2019, the respondent/claimant invoked Arbitration Clause alleging wrongful termination of the Contract and seeking damages from Chief Managing Director, BSNL. Sh. Ram Kumar was appointed as the Learned Sole Arbitrator. Claims were filed on 14th February 2019 followed by a reply to the Claim on 26th March 2019 and a rejoinder on 11th April 2019 followed by Surrejoinder on 9th May 2019.

11. Learned Sole Arbitrator proposed that since the parties' case was solely based on documents, filing of evidence could be dispensed with. The respondent/claimant did not file any evidence nor did the petitioner file any evidence.

12. Learned Sole Arbitrator passed the Impugned Award dated 27th May 2019 directing the petitioner to pay an amount of INR 7,14,57,847 including interest to the respondent within 2 months from the date of the impugned Award, failing which the petitioner will be liable to pay an additional interest @ 11% on all items of Award up to the date in which the amounts are paid.

13. Hence, on being aggrieved by the impugned Award dated 27th May 2019, the Petitioner has approached this Court with the instant petition under Section 34 of the Act, 1996 seeking the aforesaid reliefs.

SUBMISSIONS

(On behalf of the petitioner)

14. Learned counsel appearing on behalf of the petitioner submitted that the instant petition under Section 34 of the Act, 1996 is to raise important issues relating to a limb of 'public policy' on the grounds that the impugned Award is in contravention with the 'fundamental policy' of

Indian law and that the impugned Award is vitiated by ‘patent illegality’ appearing on the face of the Award on extraneous considerations dehors and contrary to the terms of the contract executed between the parties and in complete disregard of the evidence on record, in deciding the controversy between the parties.

15. Learned counsel for the petitioner further submitted that the contract between the parties was in relation to a commercial transaction entered into between the parties as prudent business persons being fully aware of its terms and implications with the intent of making profits. Further, learned Arbitrator in arriving at his conclusions on certain issues like the claim of capital and operational expenses, gave a finding contrary to the provisions of the contract between the parties.

16. It is submitted that learned Arbitrator has completely ignored/not adverted to or dealt with the incontrovertible evidence on record which shows facts completely contrary to the findings given by learned Arbitrator on various issues.

17. Learned counsel for the petitioner submitted that the declaration by the learned Sole Arbitrator that Clause 19.1 of the main Agreement is violative of Article 12 of the Constitution of India is arbitrary as learned Arbitral Tribunal is neither a Constitutional Court nor a Telecom Regulator. Clause 19.1 is reproduced hereinbelow:

“19. Liability and Disclaimer of Warranties:

19.1 Except as provided in this agreement, hereinabove, neither party shall be liable to other party nor any other virtue of termination of this agreement for any reason whatsoever for any claim for loss or profit or on account for any expenditure, investment, leases, capital improvements or any other commitments made by the other party in

connection with their business made in reliance upon or by virtue of this agreement.”

18. Learned senior counsel for the petitioner submitted that the respondent is not a novice in business/commerce and was keen to participate in the project of their own free will. It is further submitted that the respondent has not even averred that the Contract was unconscionable or arbitrary.

19. Learned senior counsel for the petitioner further submitted that the marketing, advertising and promotion services except for pushing some SMSs for advertisement were expressly outside the petitioner's domain of responsibilities as explained in Entry 17 of the Responsibility Matrix. The petitioner did transmit the messages as agreed under the Main Agreement but the learned sole Arbitrator still held that the apparent loss of business is due to the lack of proper advertising/marketing by the petitioner.

20. It is submitted that the learned Sole Arbitrator has wrongly held that the petitioner was responsible for the training of the DoP employees as it is clearly stated in Entry 8 of the Responsibility Matrix that the respondent was supposed to train the designated officials/trainers of the DoP and the respondent was supposed to coordinate for the same as a one-time activity.

21. It is submitted that the learned Sole Arbitrator has wrongly held the petitioner responsible for zero-login into devices installed at certain post offices. The Responsibility Matrix under the Main Agreement nowhere mentions that the petitioner shall ensure that the DoP employees at various Post Offices of DoP log into the devices regularly.

22. It is submitted that the learned sole Arbitrator has wrongly held the petitioner responsible for the non-revision/lowering of tariffs despite the constant requests to DoP for review of tariffs vide letters, emails, etc. Further, it is submitted that the respondent could not claim the altering of tariff prices since there was no approval from DoP and the petitioner could not grant a review/change unilaterally.

23. Learned counsel for the petitioner submitted that in terms of the Main Agreement, only review, not a revision of tariffs and other services every 6 months, was a mandatory exercise.

24. It is further submitted that the learned sole Arbitrator has wrongly held the petitioner responsible for the non-implementation of the social benefits scheme and Deutsche Bank project. It is submitted that the finding of the learned sole Arbitrator is completely based on conjectures and surmises as to what should have been done in a business model and not what the parties were contractually bound to do.

25. Learned counsel for the petitioner submits that the learned sole Arbitrator has wrongly held the petitioner responsible for non-payment of invoices raised by the respondent. It is submitted that the petitioner was obligated to make payment of the respondent's share of revenue i.e., 60% of the amount received by the DoP and that the outstanding amount of INR 7,04,000 has not yet been received by the petitioner from DoP and the 60% would be paid as soon as it is received from the DoP.

26. Therefore, it is submitted that the impugned award may be set aside by this Court.

(On behalf of the respondents)

27. *Per Contra*, learned counsel appearing on behalf of the respondent/claimant submitted that the Claims allowed by learned sole Arbitrator in the impugned Award have been admitted and duly accepted by the petitioner vide their letters dated 20th March 2018 and 7th September 2018.

28. Learned counsel for the respondent/claimant further submitted that the petitioner has objected to the impugned Award on the ground that it is in violation of Section 28(3) of the Act. It is submitted that the impugned Award has been made in accordance with the terms of the Main Agreement and there is no violation of Section 28(3) of the Act whatsoever.

29. Learned counsel for the respondent submitted that the learned sole Arbitrator had adopted a judicial approach by considering all the evidence placed on record by both parties.

30. It is further submitted that the learned sole Arbitrator is not from the legal profession. It is submitted that an Arbitrator is not supposed to write a judgment like a court of law but has only to state how he has come to the finding arrived at by him. No particular form is required for giving reasons. The arbitrator is not expected to record at length the communications exchanged or the submissions made by the parties nor is he expected to analyse the law and the authorities. It is sufficient for him to explain what his findings are and how he reached the conclusion.

31. Learned counsel for the respondent submitted that the petitioner has time and again alleged that the learned sole Arbitrator has failed to consider relevant documents placed on record by the petitioner. Such

conduct of the petitioner only reflects its wrongful attempt to persuade the Court to re-appreciate the evidence under the guise of Section 34 of the Act, 1996, which is barred under the law settled.

32. It is therefore submitted that the instant petition being devoid of any merit is liable to be dismissed.

FINDINGS AND ANALYSIS

33. Heard learned counsel for the parties and perused the record. This Court has also perused the impugned arbitral award as well as the entire arbitral record brought on record and has given thoughtful consideration to the submissions advanced by the parties.

34. The challenge to the impugned Arbitral Award *inter alia* has been made on the ground that the learned Arbitrator has completely misappreciated vital evidence and that the impugned Award is an Award rendered based on no evidence.

35. Another ground raised by the petitioner is that the learned Arbitral Tribunal has gone beyond the Main Agreement, and dealt with matters outside the scope of the Agreement.

36. Another key ground raised by the petitioner is that the learned sole Arbitrator declared that clause 19.1 was arbitrary and violative of Article 12 of the Constitution of India, but the Arbitral Tribunal is not a Constitutional Court or a Telecom Regulator to be empowered to do so.

37. The main ground taken by the learned senior counsel for the petitioner while assailing the Arbitral Award is that the impugned Arbitral Award is *ex-facie* erroneous, suffers from patent illegality, and is contrary to the fundamental policy of Indian Law. The law regarding patent illegality and public policy of India is no more *res integra* and has

been authoritatively clarified by the Hon'ble Supreme Court in a number of judicial pronouncements.

Patent Illegality and Public Policy of India

38. Before delving into the judicial decisions, it is pertinent to reproduce the relevant portion of Section 34 of the Act, 1996:-

"34. Application for setting aside arbitral award.—(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and subsection (3).

***(2) An arbitral award may be set aside by the Court only if—
(a) the party making the application [establishes on the basis of the record of the arbitral tribunal that]—***

(i) a party was under some incapacity; or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration: Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of

this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India. [Explanation 1.—For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,— (i) the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81; or (ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2.—For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.

(2-A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the court, if the court finds that the award is vitiated by patent illegality appearing on the face of the award: Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.]"

39. In *Ssangyong Engineering & Construction Co. Ltd. v. NHAI*, (2019) 15 SCC 131, the Hon'ble Supreme Court while explaining the scope of the expression 'public policy of India' made the following pertinent observations:

"23. What is clear, therefore, is that the expression "public policy of India", whether contained in Section 34 or in

Section 48, would now mean the “fundamental policy of Indian law” as explained in paragraphs 18 and 27 of Associate Builders (supra), i.e., the fundamental policy of Indian law would be relegated to the “Renusagar” understanding of this expression. This would necessarily mean that the Western Geco (supra) expansion has been done away with. In short, Western Geco (supra), as explained in paragraphs 28 and 29 of Associate Builders (supra), would no longer obtain, as under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach, the Court’s intervention would be on the merits of the award, which cannot be permitted post amendment. However, insofar as principles of natural justice are concerned, as contained in Sections 18 and 34(2)(a)(iii) of the 1996 Act, these continue to be grounds of challenge of an award, as is contained in paragraph 30 of Associate Builders (supra).

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25. Thus, it is clear that public policy of India is now constricted to mean firstly, that a domestic award is contrary to the fundamental policy of Indian law, as understood in paragraphs 18 and 27 of Associate Builders (supra), or secondly, that such award is against basic notions of justice or morality as understood in paragraphs 36 to 39 of Associate Builders (supra). Explanation 2 to Section 34(2)(b)(ii) and Explanation 2 to Section 48(2)(b)(ii) was added by the Amendment Act only so that Western Geco (supra), as understood in Associate Builders (supra), and paragraphs 28 and 29 in particular, is now done away with.

26. Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2A), added by the Amendment Act, 2015, to Section 34. Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law. In short, what is not subsumed within “the fundamental policy of Indian law”, namely, the contravention of a statute not linked to public

policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality.

27. Secondly, it is also made clear that re-appreciation of evidence, which is what an appellate court is permitted to do, cannot be permitted under the ground of patent illegality appearing on the face of the award.

28. To elucidate, paragraph 42.1 of Associate Builders (supra), namely, a mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside an arbitral award. Paragraph 42.2 of Associate Builders (supra), however, would remain, for if an arbitrator gives no reasons for an award and contravenes Section 31(3) of the 1996 Act, that would certainly amount to a patent illegality on the face of the award.

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30. What is important to note is that a decision which is perverse, as understood in paragraphs 31 and 32 of Associate Builders (supra), while no longer being a ground for challenge under “public policy of India”, would certainly amount to a patent illegality appearing on the face of the award. Thus, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse.”

40. In the instant case, it is pertinent to elaborate the meaning of the ‘Fundamental Policy of Indian Law’, as the Petitioner has taken a plea that the impugned arbitral award is contrary to the fundamental policy of Indian Law and hence, opposed to the Public Policy of India.

41. In the case of *Associate Builders vs. Delhi Development Authority*, (2015) 3 SCC 49, the Hon'ble Supreme Court clarified the meaning and scope of "*Fundamental Policy of Indian Law*" in the context of Section 34 of the Act, 1996 in the following manner:

"28. In a recent judgment, ONGC Ltd. v. Western Geco International Ltd., 2014 (9) SCC 263, this Court added three other distinct and fundamental juristic principles which must be understood as a part and parcel of the fundamental policy of Indian law. The Court held-

35. What then would constitute the "fundamental policy of Indian law" is the question. The decision in ONGC [ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705] does not elaborate that aspect. Even so, the expression must, in our opinion, include all such fundamental principles as providing a basis for administration of justice and enforcement of law in this country. Without meaning to exhaustively enumerate the purport of the expression "fundamental policy of Indian law", we may refer to three distinct and fundamental juristic principles that must necessarily be understood as a part and parcel of the fundamental policy of Indian law. The first and foremost is the principle that in every determination whether by a court or other authority that affects the rights of a citizen or leads to any civil consequences, the court or authority concerned is bound to adopt what is in legal parlance called a "judicial approach" in the matter. The duty to adopt a judicial approach arises from the very nature of the power exercised by the court or the authority does not have to be separately or additionally enjoined upon the for a concerned. What must be remembered is that the importance of a judicial approach in judicial and quasi-judicial determination lies in the fact that so long as the court, tribunal or the authority exercising powers that affect the rights or obligations of the

parties before them shows fidelity to judicial approach, they cannot act in an arbitrary, capricious or whimsical manner. Judicial approach ensures that the authority acts bona fide and deals with the subject in a fair, reasonable and objective manner and that its decision is not actuated by any extraneous consideration. Judicial approach in that sense acts as a check against flaws and faults that can render the decision of a court, tribunal or authority vulnerable to challenge.

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38. Equally important and indeed fundamental to the policy of Indian law is the principle that a court and so also a quasi judicial authority must, while determining the rights and obligations of parties before it, do so in accordance with the principles of natural justice. Besides the celebrated audi alteram partem rule one of the facets of the principles of natural justice is that the court/authority deciding the matter must apply its mind to the attendant facts and circumstances while taking a view one way or the other. Non-application of mind is a defect that is fatal to any adjudication. Application of mind is best demonstrated by disclosure of the mind and disclosure of mind is best done by recording reasons in support of the decision which the court or authority is taking. The requirement that an adjudicatory authority must apply its mind is, in that view, so deeply embedded in our jurisprudence that it can be described as a fundamental policy of Indian law.

39. No less important is the principle now recognised as a salutary juristic fundamental in administrative law that a decision which is perverse or so irrational that no reasonable person would have arrived at the same will not be sustained in a court of law. Perversity or irrationality of decisions is tested on the touchstone of Wednesbury principle of reasonableness. Decisions that fall short of the

standards of reasonableness are open to challenge in a court of law often in writ jurisdiction of the superior courts but no less in statutory processes wherever the same are available. 40. It is neither necessary nor proper for us to attempt an exhaustive enumeration of what would constitute the fundamental policy of Indian law nor is it possible to place the expression in the straitjacket of a definition. What is important in the context of the case at hand is that if on facts proved before them the arbitrators fail to draw an inference which ought to have been drawn or if they have drawn an inference which is on the face of it, untenable resulting in miscarriage of justice, the adjudication even when made by an Arbitral Tribunal that enjoys considerable latitude and play at the joints in making awards will be open to challenge and may be cast away or modified depending upon whether the offending part is or is not severable from the rest.”

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31. The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where:

- 1. a finding is based on no evidence, or*
- 2. an arbitral tribunal takes into account something irrelevant to the decision which it arrives at; or*
- 3. ignores vital evidence in arriving at its decision, such decision would necessarily be perverse.*

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33. It must clearly be understood that when a court is applying the “public policy” test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not

be held to be invalid on this score . Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts.....”

42. It is therefore clear that the decisive test is that *first*, the learned arbitrator had to adopt a judicial approach; *second*, the principles of natural justice had to be upheld; *third*, the decision must not have been egregious, or rather, perverse.

43. In ***R vs. Northumberland Compensation Appeal Tribunal. Ex Parte Shaw, 1952 1 All ER 122***, Lord Denning made the following pertinent observations:

”Leaving now the statutory tribunals, I turn to the awards of the arbitrators. The Court of King's Bench never interfered by certiorari with the award of an arbitrator, because it was a private tribunal and not subject to the prerogative writs. If the award was not made a rule of court, the only course available to an aggrieved party was to resist an action on the award or to file a bill in equity. If the award was made a rule of court, a motion could be made to the court to set it aside for misconduct of the arbitrator on the ground that it was procured by corruption or other undue means: see the statute 9 and 10 Will. III, c. 15. At one time an award could not be upset on the ground of error of law by the arbitrator because that could not be said to be misconduct or undue means, but ultimately it was held in Kent v. Elstob, (1802) 3 East 18, that an award could be set aside for error of law on the face of it. This was regretted by Williams, J., in Hodgkinson v. Fernie, (1857) 3 C.B.N.S. 189, but is now well established.”

44. The Privy Council in ***ChampseyBhara Company vs. The Jivraj Balloo Spinning and Weaving Company Ltd., AIR 1923 PC 66***, held as follows:

*“The law on the subject has never been more clearly stated than by Williams, J. in the case of **Hodgkinson v. Fernie (1857) 3 C.B.N.S. 189:-***

“The law has for many years been settled, and remains so at this day, that, where a cause or matters in difference are referred to an arbitrator a lawyer or a layman, he is constituted the sole and final judge of all questions both of law and of fact The only exceptions to that rule are cases where the award is the result of corruption or fraud, and one other, which though it is to be regretted, is now, I think firmly established viz., where the question of law necessarily arises on the face of the award or upon some paper accompanying and forming part of the award. Though the propriety of this latter may very well be doubted, I think it may be considered as established.”

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Now the regret expressed by Williams, J. in Hodgkinson v. Fernie has been repeated by more than one learned Judge, and it is certainly not to be desired that the exception should be in any way extended. An error in law on the face of the award means, in their Lordships' view, that you can find in the award or a document actually incorporated thereto, as for instance, a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous. It does not mean that if in a narrative a reference is made to a contention of one party that opens the door to seeing first what that contention is, and then going to the contract on which the parties' rights depend to see if that contention is sound. Here it is impossible to say, from what is shown on the face of the award, what mistake the arbitrators made. The only way that the learned judges have arrived at finding what the mistake was is by saying: “Inasmuch as the Arbitrators awarded so and so, and inasmuch as the letter shows that then buyer rejected the cotton, the arbitrators can only have arrived at that result by totally misinterpreting Cl.52.” But they were entitled to give

their own interpretation to Cl. 52 or any other article, and the award will stand unless, on the face of it they have tied themselves down to some special legal proposition which then, when examined, appears to be unsound. Upon this point, therefore, their Lordships think that the judgment of Pratt, J was right and the conclusion of the learned Judges of the Court of Appeal erroneous.”

45. The Hon’ble Supreme Court in ***Associate Builders (supra)***, while explaining the meaning and scope of patent illegality, held as follows:

“42. In the 1996 Act, this principle is substituted by the “patent illegality” principle which, in turn, contains three subheads

42.1 (a) A contravention of the substantive law of India would result in the death knell of an arbitral award. This must be understood in the sense that such illegality must go to the root of the matter and cannot be of a trivial nature. This again is a really a contravention of Section 28(1)(a) of the Act, which reads as under:

“28. Rules applicable to substance of dispute.— (1) Where the place of arbitration is situated in India,— (a) in an arbitration other than an international commercial arbitration, the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;”

42.2 (b) a contravention of the Arbitration Act itself would be regarded as a patent illegality- for example if an arbitrator gives no reasons for an award in contravention of section 31(3) of the Act, such award will be liable to be set aside.

42.3 (c) Equally, the third sub-head of patent illegality is really a contravention of Section 28 (3) of the Arbitration Act, which reads as under:

*“28. Rules applicable to substance of dispute.—
(3) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.”*

This last contravention must be understood with a caveat. An arbitral tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair minded or reasonable person could do.

46. The relevant portion of the Impugned Arbitral Award has been reproduced below, to apply the test as to whether the Learned Arbitrator had indeed misappreciated, or ignored relevant evidence:

“(f) Delay and non-payment of invoices raised by the Claimant

As per provision in the Main Agreement, Clause 2.8 of the Financial Conditions the Claimant shall raise invoices by 2nd of every month and the Respondent may make payment by 15th of every month subject to receipt of revenue share from DOP.

However, in case delayed payments from DOP, BSNL will make payment of revenue share to the Claimant within 15 days of receipt of the same from DOP.

The Claimant alleged that he had been raising invoices on the Respondent timely but the Respondent did not raise the same on DOP in time and some of the invoices were not raised even after non-extension of the agreements. Although during arguments the Respondent denied about this, this is clear from the DOP letter-dated 20.3.2018 and further letter-dated 26.4.2018, 19.7.2018 and finally vide their letter-dated 19.7.2018 that the respondent was to still submit

invoices to some Circles. It is clear from these letters that the Respondent did not raise some of the invoices even up to July' 2018 and it could not be ascertained during deliberations in the hearings whether the pending invoices have now been raised or not.

Moreover, the Respondent admitted the contention of the respondent that payment for his revenue share worth more than Rs 7 Lac was still pending as on March' 2018, as per the details given at Annexure-II of his letter-dated 16.3.2018, which was forwarded by the Respondent to DOP vide his letter-dated 20.3.2018.

It is seen that the Respondent neither raised the invoices to DOP nor followed up for timely payments. Moreover, some of the invoices were not even raised to DOP even after non-extension of the Agreements. The fate of such pending invoices is not known and, accordingly, the pending payments of the Revenue share to the Claimant, admitted by the Respondent, is yet to be settled.

Accordingly, the Respondent has breached the provisions of the Main Agreement on account of not raising the invoices, not pursuing DOP for timely payment of revenue share and, accordingly for non-payment of some of the Revenue shares of the Claimant.”

47. Reiterating as previously observed, “patent illegality” is an illegality that goes to the root of the matter but excludes the erroneous application of the law by an arbitral tribunal or the re-appreciation of evidence by an appellate court or a court adjudicating the challenge of an Award under Section 34. In this instant case, the Arbitral Award was a well-reasoned award, with the findings being clearly arrived at based on all the documents/evidence on record. The Arbitrator has rightfully held the petitioner responsible for the breach of the Agreement, for not raising the invoices and not paying the revenue shares to the respondent.

48. The learned Arbitrator has clearly considered all the relevant evidence of record, and the ground of “misappreciation of evidence” does not stand validated as per the submissions of the petitioner and under the observation of the Court. The impugned Award is in no way in contravention of the Arbitration and Conciliation Act, 1996, to reason that the Award is patently illegal.

49. Further in *Ssangyong Engineering & Construction Co. Ltd. (Supra)*, the Hon’ble Supreme Court went on to say that reappreciation of evidence cannot be permitted under the ground of patent illegality in a Section 34 petition under Act, 1996. The relevant portion has been reiterated below:-

38. “Secondly, it is also made clear that reappreciation of evidence, which is what an appellate court is permitted to do, cannot be permitted under the ground of patent illegality on the face of award.”

50. This is so because the decision of the Arbitral Tribunal is final and this Court is not required to carry out an exercise of re-adjudicating the disputes. An Arbitral Award may be impeached on the ground of patent illegality but as explained by the Hon’ble Supreme Court in *Delhi Airport Metro Express Pvt Ltd vs. Delhi Metro Rail Corporation (2022)*

1 SCC 131:-

“28. The limited grounds available to Courts for annulment of arbitral awards are well known to legally trained minds. However, the difficulty arises in applying the well-established principles for interference to the facts of each case that come up before the courts. There is a disturbing tendency of Courts of setting aside arbitral awards, after dissecting and reassessing factual aspects of the cases to come to a conclusion that the award needs intervention and

thereafter, dubbing the award to be vitiated by either perversity or patent illegality, apart from the other grounds available for annulment of the award.

29. Patent illegality should be illegality which goes to the root of the matter. In other words, every error of law committed by the Arbitral Tribunal would not fall within the expression "patent illegality". Likewise, erroneous application of law cannot be categorised as patent illegality. In addition, contravention of law not linked to public policy or public interest is beyond the scope of the expression "patent illegality". What is prohibited is for Courts to reappreciate evidence to conclude that the award suffers from patent illegality appearing on the face of the award, as Courts do not sit in appeal against the arbitral award. The permissible grounds for interference with a domestic award under Section 34(2-A) on the ground of patent illegality is when the arbitrator takes a view which is not even a possible one, or interprets a clause in the contract in such a manner which no fair-minded or reasonable person would, or if the arbitrator commits an error of jurisdiction by wandering outside the contract and dealing with matters not allotted to them. An arbitral award stating no reasons for its findings would make itself susceptible to challenge on this account. The conclusions of the arbitrator which are based on no evidence or have been arrived at by ignoring vital evidence are perverse and can be set aside on the ground of patent illegality. Also, consideration of documents which are not supplied to the other party is a facet of perversity falling within the expression "patent illegality".

51. This was earlier enunciated in ***State of Jharkhand v. HSS Integrated SDN, (2019) 9 SCC 798***. The relevant paragraph of the judgment is reiterated below:

"6.2. This Court has observed and held that the Arbitral Tribunal is the master of evidence and the findings of fact which are arrived at by the arbitrators on the basis of the

evidence on record are not to be scrutinised as if the Court was sitting in appeal."

Interpretation of Agreement

52. The petitioner had raised a ground that the learned Arbitral Tribunal has gone beyond the Main Agreement, and dealt with matters outside the scope of the Agreement. They further contended that the impugned award was in violation of Section 28(3) of the Act, 1996, and the learned Arbitral Tribunal was to decide the dispute in accordance with the terms of the contract. Section 28(3) of the Act, 1996 is reproduced below:

"28(3) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."

53. In the instant case, the Arbitral Tribunal is a creature of contract, and the contract is the only basis on which the learned Arbitral Tribunal should adjudicate, apart from the general provisions of law and jurisprudence.

54. As a creature of contract, upholding the contract and adjudicating on the lines drawn by it, is the learned Sole Arbitrator's responsibility. The *onus* of the rightful interpretation of the contract is also on the learned Sole Arbitrator.

55. The relevant portion of the impugned award is reproduced hereinafter to analyze unambiguously whether the submission of the petitioner has any substance.

"(e) Repeated Training of DOP Employees.

*As per the Main Agreement, the Claimant was supposed to train designated officials / trainers of DOP and the Respondent was supposed to coordinate for the same **as a one time activity**. The Claimant complied for the same in the 1st year of launch of the Services itself and specially designed hand and web-based training modules were provided for the staff of the DOP. Also, a full-fledged Call Center was provided for the assistance of DOP employees so that they could take any clarification at any time in case of any confusion in the use of services or in operation of the specially designed handsets. The trained trainers were supposed to provide training to any further staff in future as and when required.*

In spite of a large number of staff/trainers been trained in each Circle throughout India, the demand for training further staff continued all through 6 years of the Agreement on the pretext of transfer of staff, DOP being a Govt. Department. It is to be noted that training of each and every employee costs to the Claimant as such training is to be imparted on the respective Circle HQ. Moreover, the services of the trained trainers were never utilized for training further staff due to transfers. The Claimant had to comply and train the additional staff over a period of 6 years of agreement, for which the Claimant had to incur additional expenditure.

Accordingly, the Respondent has breached the provisions of the Main Agreement on account of not pursuing DOP for avoiding a continuous training of staff, which was a one-time activity as per the Agreement.”

56. A plain reading of the aforementioned portion of the impugned award makes it clear that the learned Arbitral Tribunal has considered the necessary facets of the Main Agreement along with the evidence present on the record. Learned Sole Arbitrator does not have the power to adjudicate and allow a claim when there is no evidence to support it. The

decision of the learned Arbitral Tribunal must be on the basis of the evidence placed on record.

57. The Court relies on *Foo Jong Peng and others v Phua Kiah Mai and another* [2012] 4 SLR 1267, where the Supreme Court of Singapore delved into the interpretation of contracts by the Learned Arbitrator during the Arbitral process. The relevant portion of the judgment is reiterated below:-

"36. In summary, although the process of the implication of terms does involve the concept of interpretation, it entails a specific form or conception of interpretation which is separate and distinct from the more general process of interpretation (in particular, interpretation of the express terms of a particular document). Indeed, the process of the implication of terms necessarily involves a situation where it is precisely because the express term(s) are missing that the court is compelled to ascertain the presumed intention of the parties via the "business efficacy" and the "officious bystander" tests (both of which are premised on the concept of necessity). In this context, terms will not be implied easily or lightly. Neither does the court imply terms based on its idea of what it thinks ought to be the contractual relationship between the contracting parties. The court is concerned only with the presumed intention of the contracting parties because it can ascertain the subjective intention of the contracting parties only through the objective evidence which is available before it in the case concerned. In our view, therefore, although the Belize test is helpful in reminding us of the importance of the general concept of interpretation (and its accompanying emphasis on the need for objective evidence), we would respectfully reject that test in so far as it suggests that the traditional "business efficacy" and "officious bystander" tests are not central to the implication of terms. On the contrary, both these tests (premised as they are on the concept of necessity) are an integral as well as

indispensable part of the law relating to implied terms in Singapore."

58. Further, in the case of ***Ssangyong Engineering & Construction Co. Ltd. (Supra)***, the Hon'ble Supreme Court made the following pertinent observations:

"40. The change made in Section 28(3) by the Amendment Act really follows what is stated in paras 42.3 to 45 in Associate Builders, namely, that the construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes the contract in a manner that no fair-minded or reasonable person would; in short, that the arbitrator's view is not even a possible view to take. Also, if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added under Section 34(2-A).

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76. However, when it comes to the public policy of India, argument based upon "most basic notions of justice", it is clear that this ground can be attracted only in very exceptional circumstances when the conscience of the Court is shocked by infraction of fundamental notions or principles of justice. It can be seen that the formula that was applied by the agreement continued to be applied till February 2013 — in short, it is not correct to say that the formula under the agreement could not be applied in view of the Ministry's change in the base indices from 1993-1994 to 2004-2005. Further, in order to apply a linking factor, a Circular, unilaterally issued by one party, cannot possibly bind the other party to the agreement without that other party's consent. Indeed, the Circular itself expressly stipulates that it cannot apply unless the contractors furnish an undertaking/affidavit that the price adjustment under the Circular is acceptable to them. We have seen how the appellant gave such undertaking only conditionally and without prejudice to its argument that the Circular does not

and cannot apply. This being the case, it is clear that the majority award has created a new contract for the parties by applying the said unilateral Circular and by substituting a workable formula under the agreement by another formula dehors the agreement. This being the case, a fundamental principle of justice has been breached, namely, that a unilateral addition or alteration of a contract can never be foisted upon an unwilling party, nor can a party to the agreement be liable to perform a bargain not entered into with the other party. Clearly, such a course of conduct would be contrary to fundamental principles of justice as followed in this country, and shocks the conscience of this Court. However, we repeat that this ground is available only in very exceptional circumstances, such as the fact situation in the present case. Under no circumstance can any court interfere with an arbitral award on the ground that justice has not been done in the opinion of the Court. That would be an entry into the merits of the dispute which, as we have seen, is contrary to the ethos of Section 34 of the 1996 Act, as has been noted earlier in this judgment.”

59. Therefore, the principle is that if the Arbitrators use the contract itself to determine a dispute, clauses should, in principle, be construed *contra proferentem*, meaning that they should be interpreted against the party that drafted it.

60. The rule of *contra proferentem* can be regarded as a ‘general canon’ of interpretation that exists independently of national legal systems. In **ICC Case No. 7110, (1999) 10 ICC Bulletin 39, 44**, the Arbitral Tribunal made it clear that it is a ‘general principle of interpretation’ widely accepted by national legal systems and by the practice of International Arbitral Tribunals, including ICC Arbitral Tribunals, that in case of doubt or ambiguity, contractual provisions, terms or clauses should be interpreted against the drafting party.

61. In the instant case, the petitioner had drafted the Main Agreement in which the respondent was a signatory. The Learned Arbitrator having observed various interpretations of the contract, chose to endorse the interpretation that is favorable to the respondent. The application of the rule of *contra proferentem* validates the learned Arbitrator's findings and observations regarding the interpretation of the contract so as to decide the question of breach of the contract. The relevant portion of the Award is produced below:-

“(c) Marketing:

As per the Main Agreement, there was no responsibility of the Claimant as well as the Respondent for Marketing of the Services, except Push SMS by the Respondent. As per DOP Agreement, this responsibility was wholly placed on DOP. The Services were meant for the masses on PAN-India basis and, as such, a provision was made under Clause 1.8 of Commercial Conditions of the Main Agreement" The parties were required to undertake all the activities for efficient rendering of the Services," which could have been achieved by doing an intensive marketing and promotion by using various marketing platforms prevalent in the market.

However, DOP completely failed and the Respondent could not pursue DOP for carrying out intensive Marketing of Services, except putting a stall once in a Telecom Fair organized by DOT/FICCI for promoting various Telecom Services and Equipment (this fair is visited by the people who are interested in various latest Telecom Technologies and equipment and not by the masses to using the Services). During visits of various Post offices throughout India, the representatives of the Claimant observed that most of the people visiting post offices and using postal facilities were totally unaware about the Services even after many years of launch of the same.

Vide letters dated 20.2.2018 & 7.9.2018 to DOP, the Respondent also agreed about the main reason for failure of

the Services and its being unviable was due to the total lack of marketing. The Respondent was supposed to play a more proactive role in getting adequate marketing done by DOP, in which the Respondent failed totally.

Accordingly, the Respondent has breached the provisions of the Main Agreement on account of not pursuing and getting adequate marketing of the Services done by DOP, that being one the main reasons for rendering the Services unpopular and hence unviable.”

62. It is, thus, clear that a reading of the impugned Arbitral Award proves that learned Arbitrator may chose one view that falls within the principles of jurisprudence and gave ample reasoning for the same when there is a multiplicity of views regarding the interpretation of the Contract.

63. Therefore, in the instant case, the learned Arbitrator has not acted in violation of Section 28(3) of the Act, 1996, as the interpretation of the contract has been done *contra proferentem*, and adequate reasoning is given for the same.

Analysis of Contractual Provisions

64. A key ground of objection was that the learned Sole Arbitrator is not a Constitutional Court and thus is not empowered to declare that Clause 19.1 of the Main Agreement is contrary to Article 12 of the Constitution of India. Article 12 of the Constitution of India is reproduced below:

“12. Definition.—In this Part, unless the context otherwise requires, “the State” includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government

of India.”

65. The relevant portion of the impugned Award is reproduced hereinbelow:

“(h) Provision in Clause 19.1 of the Main Agreement

During presentation of the arguments by the counsel of the Respondent during concluding hearing, it was argued that neither party could be held responsible for any claim for any loss / profits etc, as per Clause 19.1 of the Commercial Conditions of the Main Agreement which states that:

"Except as provided in this agreement, hereinabove, neither party shall be liable to the other party nor any other virtue of termination of this agreement for any reason whatsoever for any claim for loss/profits or on account for any expenditure, investment, leases, capital improvements or any. other commitments made by virtue of this agreement."

The contention of the Respondent for applicability of this Clause is not tenable in this case due to the following:

*- Language of this his Clause is on unrealistic and unreasonable basis and is against the spirits of Article 12 of the Indian constitution, "The **Respondent BSNL** is a Govt. owned organization and comes under definition of 'State' under Article 12 of Constitution of India. As such, he is under the obligation to act fairly even in commercial matters."*

- The wording "Except as provided in this agreement" makes it clear that the provisions of the Agreement are not subject to the rigours of the present clause.

- This clause applies to situations arising out of the termination of the Main Agreement and, as such, does not apply in the present situation."

66. A bare reading of the aforementioned portion of the impugned Award makes it clear that the reasoning given by the learned Arbitrator has perfectly validated his decision. The learned Arbitrator had carefully considered the Agreement and subsequently compared it with the existing

provisions of law to reach the conclusion that the said provision of the Agreement is in contravention of the Constitution of India.

67. In *A School India Private Limited v. E. Vijayalakshmi*, 2019 SCC OnLine Mad 30393, the High Court of Madras had noted a key point regarding perversity and the Arbitrator's power to adjudicate. The relevant paragraph has been reproduced hereinbelow:

“43. Also to be noted, this Court has reminded itself that the time honoured Hodgkinson principle has been explained by the Hon'ble Supreme Court in Associate Builders v. Delhi Development Authority case reported in (2015) 3 SCC 49. Hodgkinson principle in very simplistic terms is a principle which lays down that AT is the best and sole Judge of the quality and quantity of evidence before it, the only exception perversity/irrationality in appreciation of same. With regard to perversity/irrationality, the Hon'ble Supreme Court in ONGC Ltd. v. Western Geco International Ltd., reported in (2014) 9 SCC 263, culled out three juristic principles and held that the test for perversity/irrationality is a time honoured Wednesbury principle of reasonableness. In very simple language Wednesbury principle of reasonableness is to the effect that the conclusions arrived at by AT should be so unreasonable that no reasonable person could have arrived at such conclusion on the basis of materials before it.”

68. In *Indian Oil Corpn. Ltd. v. Shree Ganesh Petroleum*, (2022) 4 SCC 463, the Hon'ble Supreme Court has reiterated that the Arbitrator is a creature of the contract, as discussed above. The relevant paragraphs are reproduced below:

“43. An Arbitral Tribunal being a creature of Contract, is bound to act in terms of the Contract under which it is constituted. An Award can be said to be patently illegal where the Arbitral Tribunal has failed to act in

terms of the Contract or has ignored the specific terms of a Contract.

44. However, a distinction has to be drawn between failure to act in terms of a Contract and an erroneous interpretation of the terms of a Contract. An Arbitral Tribunal is entitled to interpret the terms and conditions of a Contract, while adjudicating a dispute. An error in interpretation of a Contract in a case where there is valid and lawful submission of arbitral disputes to an Arbitral Tribunal is an error within jurisdiction.

45. The Court does not sit in appeal over the Award made by an Arbitral Tribunal. The Court does not ordinarily interfere with interpretation made by the Arbitral Tribunal of a Contractual provision, unless such interpretation is patently unreasonable or perverse. Where a Contractual provision is ambiguous or is capable of being interpreted in more ways than one, the Court cannot interfere with the arbitral Award, only because the Court is of the opinion that another possible interpretation would have been a better one.

46. In Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , this Court held that an Award ignoring the terms of a Contract would not be in public interest. In the instant case, the Award in respect of the lease rent and the lease term is in patent disregard of the terms and conditions of the lease Agreement and thus against public policy. Furthermore, in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] the jurisdiction of the Arbitral Tribunal to adjudicate a dispute itself was not in issue. The Court was dealing with the circumstances in which a court could look into the merits of an Award.

47. In this case, as observed above, the Impugned Award insofar as it pertains to lease rent and lease period is patently beyond the scope of the competence of the Arbitrator appointed in terms of the dealership

Agreement by the Director (Marketing) of the appellant.

48. The lease Agreement which was in force for a period of 29 years with effect from 15-4-2005 specifically provided for monthly lease rent of Rs 1750 per month for the said plot of land on which the retail outlet had been set up. It is well settled that an Arbitral Tribunal, or for that matter, the Court cannot alter the terms and conditions of a valid Contract executed between the parties with their eyes open.

49. In Ssangyong Engg. & Construction Co. Ltd. v. NHAI [Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213] , this Court held : (SCC pp. 199-200, para 76)

“76. However, when it comes to the public policy of India, argument based upon “most basic notions of justice”, it is clear that this ground can be attracted only in very exceptional circumstances when the conscience of the Court is shocked by infraction of fundamental notions or principles of justice. It can be seen that the formula that was applied by the Agreement continued to be applied till February 2013 — in short, it is not correct to say that the formula under the Agreement could not be applied in view of the Ministry's change in the base indices from 1993-1994 to 2004-2005. Further, in order to apply a linking factor, a circular, unilaterally issued by one party, cannot possibly bind the other party to the Agreement without that other party's consent. Indeed, the circular itself expressly stipulates that it cannot apply unless the Contractors furnish an undertaking/affidavit that the price adjustment under the circular is acceptable to them. We have seen how the appellant gave such undertaking only conditionally and without prejudice to its argument that the Circular does not and cannot apply. This being the case, it is clear that the majority Award has created a new Contract for the parties by applying the said unilateral circular and by substituting

a workable formula under the Agreement by another formula dehors the Agreement. This being the case, a fundamental principle of justice has been breached, namely, that a unilateral addition or alteration of a Contract can never be foisted upon an unwilling party, nor can a party to the Agreement be liable to perform a bargain not entered into with the other party. Clearly, such a course of conduct would be contrary to fundamental principles of justice as followed in this country, and shocks the conscience of this Court. However, we repeat that this ground is available only in very exceptional circumstances, such as the fact situation in the present case. Under no circumstance can any court interfere with an arbitral Award on the ground that justice has not been done in the opinion of the Court. That would be an entry into the merits of the dispute which, as we have seen, is contrary to the ethos of Section 34 of the 1996 Act, as has been noted earlier in this judgment.”

50. In *PSA Sical Terminals (P) Ltd. v. V.O. Chidambranar Port Trust* [PSA Sical Terminals (P) Ltd. v. V.O. Chidambranar Port Trust, (2021) 18 SCC 716 : 2021 SCC OnLine SC 508] this Court referred to and relied upon *Ssangyong Engg. & Construction* [Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213] and held : (PSA Sical Terminals case [PSA Sical Terminals (P) Ltd. v. V.O. Chidambranar Port Trust, (2021) 18 SCC 716 : 2021 SCC OnLine SC 508] , SCC para 85)

“85. As such, as held by this Court in *Ssangyong Engg. & Construction* [Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213] , the fundamental principle of justice has been breached, namely, that a unilateral addition or alteration of a Contract has been foisted upon an unwilling party. This Court has further held that a party to the Agreement cannot be made liable to perform something for which it has not entered into a Contract.

In our view, re-writing a Contract for the parties would be breach of fundamental principles of justice entitling a court to interfere since such case would be one which shocks the conscience of the Court and as such, would fall in the exceptional category.”

51. In PSA Sical Terminals [PSA Sical Terminals (P) Ltd. v. V.O. Chidambranar Port Trust, (2021) 18 SCC 716 : 2021 SCC OnLine SC 508] this Court clearly held that the role of the Arbitrator was to arbitrate within the terms of the Contract. He had no power apart from what the parties had given him under the Contract. If he has travelled beyond the Contract, he would be acting without jurisdiction.

52. In PSA Sical Terminals [PSA Sical Terminals (P) Ltd. v. V.O. Chidambranar Port Trust, (2021) 18 SCC 716 : 2021 SCC OnLine SC 508] this Court referred to and relied upon the earlier judgment of this Court in Army Welfare Housing Organisation v. Sumangal Services (P) Ltd. [Army Welfare Housing Organisation v. Sumangal Services (P) Ltd., (2004) 9 SCC 619] and held that an Arbitral Tribunal is not a court of law. It cannot exercise its power ex debito justitiae.

53. In Satyanarayana Construction Co. v. Union of India [Satyanarayana Construction Co. v. Union of India, (2011) 15 SCC 101 : (2014) 2 SCC (Civ) 252] , a Bench of this Court of coordinate strength held that once a rate had been fixed in a Contract, it was not open to the Arbitrator to rewrite the terms of the Contract and Award a higher rate. Where an Arbitrator had in effect rewritten the Contract and Awarded a rate, higher than that agreed in the Contract, the High Court was held not to commit any error in setting aside the Award.

69. Being a creature of the Contract, the Arbitrator also has to analyze and adjudicate whether the Contract is made fairly. The principle of

contra proferentem finds its relevance as the Principle of Natural Justice also finds its place in the interpretation of Contracts.

70. In *Timegate Studios, Inc. v. Southpeake Interactive, LLC*, 860 F. Supp. 2d 350 (2009), the United States District Court for the Southern District of Texas, Houston Division, adjudicated upon the power of the Arbitrator to implicitly void portions of the Contract, which engulfed the bigger point of law that the Arbitrator has the power to declare portions of the Contract null and void if it is found to be contrary to the law of the land. It was held as under:

*“Because the Court has concluded that the arbitrator acted contrary to the parties' Agreement in creating a perpetual license and in allowing Defendants to recover their milestone payments, the Court must consider whether he was empowered to do so based upon his finding of fraudulent inducement. In urging that he was, Defendants are asking the Court to find (1) that fraudulent inducement gives an arbitrator the power to void portions of the contract at issue; and (2) that, when an arbitrator acts contrary to certain contractual provisions, he must be seen as having implicitly voided the contrary contractual provisions. The Fifth Circuit has not yet determined whether an arbitrator may, because of fraudulent inducement, implicitly [**24] void portions of a contract, while at the same time finding that the contract remains in effect. However, Defendants contend that case law confirms an arbitrator's power to do so.*

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*In urging that arbitrators may void portions of a contract without making clear that they are doing so, Defendants remind the Court that “[a]rbitrators need not give reasons for their awards,” and that “[e]ven when arbitrators do not provide a rationale for their awards, courts may not review that reasoning.” Netknowledge, 2007 U.S. Dist. LEXIS 11550, 2007 WL 518548, at *3 (citing Brabham v. A.G. Edwards & Sons, Inc., 376 F.3d 377, 385 (5th Cir. 2004)).*

*In Executone, 26 F.3d at 1328, for example, the arbitrator did not explicitly void any contractual provisions when he rendered an award that contradicted release and limitation of liability clauses in the parties' [**28] contract. The Fifth Circuit found that the arbitrator "could certainly have rationally concluded" that the release clause did not apply to the dispute, and that the limitation of liability clause should not be strictly interpreted. Thus, Executone makes clear that an arbitrator's award is "not contrary to the express terms of the parties' agreement" where the arbitrator rationally could have concluded that the contrary provisions in the parties' agreement do not apply. The arbitrator does not need to be explicit about such a finding, and a Court is to infer it where it is rationally possible. Indeed, in Netknowledge, 2007 U.S. Dist. LEXIS 11550, 2007 WL 518548, at *3, while the arbitrator explained why found the merger clause inapplicable, he never discussed the limitation of liability provision, which also conflicted with his award. These cases make clear than an arbitrator can implicitly void portions of a contract without providing his reasons for doing so. Again, though, a court can determine that an arbitrator was within his power to implicitly void portions of a contract only if such a conclusion is "rationally inferable from the parties' central purpose in drafting the agreement." Executone, 26 F.3d at 1328. [**29] If it were otherwise, a finding of fraudulent inducement plus implicit voiding would allow courts to avoid the necessary "essence" inquiry."*

71. The Constitution of India, is the law of the land and it must be treated as such irrespective of the proceedings, even in Arbitration. The Arbitral Tribunal is bound by substantive law like the Indian Contract Act, 1872 as well as the Contract entered into by the parties in itself. The mandate of testing the validity of the Contract and analyzing the legality of the provisions of the contract is also vested with the Arbitral Tribunal.

72. The State cannot escape responsibility by creating a contract to absolve itself of any kind of liability.

73. In the instant case, Clause 19.1 which stipulates that neither party can claim for loss/profit is clearly contrary to the principles of justice and equity. Being State under Article 12 of the Constitution of India, it is wholly unlawful for the petitioner to create a contract that excludes them from any liability.

74. A clear reading of the precedents cited proves that under the limited scope of Section 34 of the Act, 1996, the present case does not warrant the interference of this Court, as the grounds stated by the Petitioner in the instant petition do not meet the scope of this section. In the instant case, the petitioner claimed that the Arbitrator misappreciated the evidence on record, but a careful reading of the Award proves that the Arbitrator has rightly relied on relevant evidence to adjudicate. Accordingly, with reference to the aforesaid judgments and the impugned Arbitral Award, the Petitioner cannot have the benefit of the '*ground of patent illegality*' to assail the impugned Arbitral Award under Section 34 of the Act, 1996.

75. Therefore, as discussed in the foregoing paragraphs in the present petition, the Learned Arbitrator had clearly referred to the evidence on record, as reproduced above, and made his observations within the ambit of the contract.

CONCLUSION

76. In light of the facts, submissions, and contentions in the pleadings, this Court finds that the petitioner has failed to corroborate with evidence

as to how the Learned Arbitrator's finding regarding the breach of the Agreement is contrary to the Public Policy of India. Even if the contentions of the petitioner *qua* patent illegality in the Impugned Arbitral Award is accepted, then also no ground has been made out to set aside the Award inasmuch as the threshold to interfere and set aside an Arbitral Award has not been met.

77. The Court is unable to subscribe to the submissions made by the learned counsel for the petitioner. The petitioner has failed to show that the Arbitral Award has been passed by the Learned Arbitrator by not considering the evidence on record. Further, the petitioner has not been able to prove that the impugned Arbitral Award is patently illegal, and contrary to the fundamental policy of Indian Law, and hence is liable to be set aside.

78. It is settled law that the ground of Patent illegality gives way to setting aside an Arbitral Award with a very minimal scope of intervention. A party cannot simply raise an objection on the ground of patent illegality if the Award is simply against them. Patent illegality requires a distinct transgression of law, the clear lack of which makes the petition simply a pointless effort of objection towards an Award made by a competent Arbitral Tribunal.

79. The Court is of the view that on the application of the rule of *contra proferentem*, the Agreements were fittingly interpreted by the Learned Arbitrator, leaving no scope for the interference of this Court on the Award. The Learned Arbitrator rightfully found the petitioner to be guilty of breach of contract, which resulted in the respondent incurring losses.

80. The Court disagrees with the petitioner's submission that the Arbitrator cannot declare a provision of the Contract as unconstitutional, as the Arbitrator has the power to examine the quantum of the loss and attribute it to the person responsible. So a provision that bars a party that is State under Article 12 of the Constitution of India, from assuming liability can be held to be unconstitutional by the learned Arbitrator.

81. In view of the above discussion of facts and law, this Court finds no reason to set aside the Impugned Arbitral Award.

82. The petition is, accordingly, dismissed along with pending applications, if any.

83. The judgment be uploaded on the website forthwith.

(CHANDRA DHARI SINGH)
JUDGE

APRIL 18, 2023
gs/as

